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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~495~~ 74

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY.

MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CYRUS AUSTIN,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1956

No. 465

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

STANDARD OIL COMPANY.

MOTION FOR LEAVE TO FILE BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc., respectfully move this Court for leave to file a brief, as *amici curiae*, in support of the petition for certiorari filed herein by the Solicitor General of the United States in behalf of the Federal Trade Commission. The Solicitor General has consented to the filing of such a brief; consent thereto has been requested but not received from Standard Oil Company.

Interest of *Amici Curiae*

National Congress of Petroleum Retailers, Inc. is a trade congress of State and local associations of retail gasoline dealers, national in scope, formed for the purpose of fostering and promoting the interests and welfare of the 275,000 petroleum retailers in the United States. Its membership is comprised of 67 state and local associations located in 34 states and the District of Columbia.

Retail Gasoline Dealers Association of Michigan, Inc., is a non-profit membership corporation serving the interests of the retail gasoline dealers of that State. It is a

member of National Congress of Petroleum Retailers, Inc. The Association has more than 2600 members in the State of Michigan and more than 1500 members in the Detroit metropolitan area, where this case arose.

The retail gasoline dealers of Detroit and of the nation have a direct and vital interest in the outcome of this proceeding. This record shows that Standard Oil Company and other major oil companies have engaged in the practice of selling their branded gasolines to certain large volume purchasers, classified by them as "jobbers" but reselling in whole or in part at retail, at a price substantially lower than the price which they charge for the same gasolines to the many hundreds of smaller retail dealers whom they supply in the same marketing area. This discriminatory pricing practice is regularly engaged in by these oil companies not only in Detroit but in other areas in various parts of the United States. The Commission has found, and it is now undisputed, that this price discrimination has had and may have the effect of seriously injuring and destroying competition between the favored large volume purchasers and the other retailers who must compete with them in the resale of said gasolines. The purpose of the order issued by the Commission herein, which the Court below set aside, is to protect the retail gasoline dealers of Detroit and other areas served by petitioner from the injurious effects of such price discrimination. Said order, if affirmed by this Court, presumably will be respected and complied with not only by Standard Oil Company but by the other major oil companies. The dealers represented by these Associations, therefore, are directly concerned with the affirmance and enforcement of said order, and are, in fact, real parties in interest in this proceeding.

Questions Presented

This case presents two questions of great present importance. It is believed that the industry-wide significance of these questions, affecting the welfare and livelihood of retail gasoline dealers throughout the country, is not sufficiently emphasized in the petition for certiorari.

1. The first question may be variously stated as follows:

May a quantity price or discount, regularly granted to a few large volume purchasers by a major supplier of a commodity, and otherwise unlawfully discriminatory, be justified under the "good faith" proviso by showing that other major suppliers of such commodity regularly grant the same differential or discount to purchasers of like volume?

May adherence to a discriminatory pricing practice continuously employed by the dominant suppliers in an industry be justified under the "good faith" clause on the ground that it is an "industry practice" and that a particular supplier not adhering to it might lose customers?

Was it the intent of Congress, in inserting the "good faith" limitation in Section 2(b), to permit the *constant* allowance of unearned price differentials to large volume buyers by dominant suppliers or as an industry practice?

The above question is directly presented for disposition in this case, for the following reasons:

The assertion of the "meeting competition" defense in this case is an effort by the major oil companies, as represented by Standard Oil Company, to justify and obtain judicial sanction of a long used pricing practice whereby a quantity price differential based on annual volume is granted to a few large gasoline retailers in metropolitan areas, and to wholesalers reselling in part at retail, but is denied to the great number of smaller retail dealers who must compete in the resale of the same branded gasoline with the large volume purchasers.

The major oil companies who, like Standard, sell their gasoline at two prices in the same marketing area, quote these prices as a "tank car price" and a "tank wagon price." The lower or "tank car price" is offered only to those customers who are permitted to purchase in tank car quantities and who are classified by the oil companies as "jobbers." Actually, however, this lower price is neither a tank car price nor a functional price. It is not truly a tank car price since it is not available to any customer who wishes and is able to buy and take delivery in tank carloads. It is not a functional price because the large customers classi-

fied as jobbers are so classified without regard to whether they resell in part or in whole at retail. The major oil companies impose an annual volume requirement for "jobber" recognition, and this requirement is made so high that only the largest volume purchasers can qualify.

The tank wagon prices and the tank car prices of the major oil companies are almost always the same. This is true as a matter of common knowledge and is confirmed by this record. There is some testimony as to reports to Standard of "offers" by other major oil companies to sell in tank car quantities at less than the tank car price, or on better terms, but none of these reported offers was substantiated by testimony of any representative of the company involved. Standard never met any such reported offer and never reduced its tank car price below the customary differential; and there is no evidence that any other major oil company did so. It thus appears that there was in reality no price competition for the business of any of the jobbers.

The broad question presented, then, is whether the continuous employment of the same quantity price differential by major suppliers, on terms available only to the largest purchasers, can be justified by one of those suppliers on the ground of meeting its competitors' prices in good faith. The legislative history of the Robinson-Patman Act, as well as the subsequent decisions of this Court, require that this question be answered in the negative.

2. The second question presented is directly raised by the opinion of the Court of Appeals, going to the basic purposes of the Robinson-Patman Act and having an important bearing upon the future administration and enforcement of that Act.

Referring to the changes made in the meeting competition defense by the Robinson-Patman Act, the Court of Appeals cites the statement of this Court in its prior opinion in this case that "None of these changes, however, cut into the actual core of the defense," and thereupon concludes:

> "It would thus appear that a 'good faith' defense available under the Clayton Act would still be avail-

> able under the amended act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

The Court of Appeals thus has held that Congress, in enacting the Robinson-Patman Act, failed in its purpose to strengthen Section 2 of the Clayton Act by closing or at least narrowing the loopholes provided by the old defenses. The decisions of this Court are to the contrary.

In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, this Court said:

> "Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased the less-than-carloads lots. To this end it undertook to strengthen this very phase of the old Clayton Act."

and in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, this Court found that

> "The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."

We submit that the construction given the meeting competition proviso by the court below, as well as its approval of the discriminatory quantity pricing practice above described, should be reviewed by this Court.

Your applicants request the Court's consideration of this motion and, if said motion be granted, that the foregoing statement in support thereof be accepted as their brief in support of the petition for certiorari.

Respectfully submitted,

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Attorneys for National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc.

CYRUS AUSTIN,
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